Notes

Allocating the Local Apportionment Pie: What Portion for Resident Aliens?

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In the 1994 elections, in a movement born of fiscal austerity and nativism, Americans decided to strip aliens of eligibility for a host of basic government services. Californians flocked to the polls to block illegal aliens from attending public schools, receiving prenatal care, or enjoying most other government benefits.[1] Two embattled governors—California Republican Pete Wilson and Florida Democrat Lawton Chiles—swept back to power as champions of the new fiscal exclusivity.[2] Republicans, who catapulted to control of the U.S. Congress for the first time in forty years, campaigned on a promise to cut government aid to *legal* aliens as part of their Contract with America.[3]

1. Proposition 187, a citizens' ballot initiative, passed by a 3–2 margin, but was immediately subjected to court challenges that temporarily barred its implementation. Paul Feldman & Rich Connell, *Wilson Acts To Enforce Parts of Prop. 187; 8 Lawsuits Filed*, L.A. TIMES, Nov. 10, 1994, at A1.

2. Wilson was an early and enthusiastic supporter of Proposition 187 and advocated curtailing almost all government services to illegal aliens. *See infra* note 46. By contrast, Chiles focused not on eliminating services to illegal aliens, but on making the federal government pick up the tab. Mark Silva, *Immigration Suit Seeks $1 Billion*, MIAMI HERALD, Apr. 10, 1994, at 1A. While Chiles did cut foster care service to illegal aliens, Larry Rohter, *Florida Opens New Front in Fight on Immigration Policy*, N.Y. TIMES, Feb. 10, 1994, at A14, Chiles said after his reelection that he would oppose a Proposition 187 measure in Florida, Jay Hamburg, *Aliens Target of Committee: Group Wants Vote on Immigration Measure*, ORLANDO SENTINEL, Jan. 11, 1995, at 21A.

3. NEWT GINGRICH ET AL., CONTRACT WITH AMERICA 73–74 (Ed Gillespie & Bob Schellhas eds., 1994); Robert Pear, *Deciding Who Gets What in America*, N.Y. TIMES, Nov. 27, 1994, § 4, at 5 ("Republicans reckon that they can save more than $21 billion over five years by barring legal immigrants from 60 programs, including Medicaid, food stamps and welfare.").

Today's animosity toward aliens is driven by the potent interplay of dollars and demographics.[4] Many citizens perceive aliens to be a drain on America's scarce government resources, absorbing more in services than they pay in taxes. Justified or not, these fears have mounted with a demographic wave. More immigrants entered the United States in the 1980's than in any other decade in American history.[5] During the last two decades, the number of noncitizens,[6] including both legal aliens and illegal aliens,[7] more than tripled, soaring from 3.5 million in 1970 to 11.8 million in 1990.[8] Many of those noncitizens have clustered in a few areas, especially South Florida and Southern California. In 1990, Florida's Dade County led the nation with the highest percentage of adult noncitizens, 32.8%.[9] Los Angeles County came next with 26.9% adult noncitizens, compared to 5.7% for the country as a whole.[10]

Today's anti-immigrant fever first surfaced in California and Florida, stoked by their high concentrations of noncitizens, and remains most pronounced there. Both states have chafed under the financial burden of

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4. This dynamic is exacerbating America's growing insecurity about its global competitiveness and its ability to assimilate today's immigrants, most of whom are not of European origin. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (2d ed. 1974) (explaining types of factors that contribute to outbursts of American nativism).

5. From 1981 to 1990, 7,338,062 immigrants were lawfully admitted into the United States. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1991 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 27 tbl. 1 (1991) [hereinafter 1991 STATISTICAL Y.B.]. That total does not include 1,123,162 aliens who applied for legalization under the amnesty provision of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, but whose applications were not approved until 1991. 1991 STATISTICAL Y.B., *supra*, at 34 tbl. 4. In all, 8,467,224 immigrants entered during the 1980's or filed a successful application for legalization. *Id.* at 27 tbl. 1, 34 tbl. 4. In addition, an estimated 100,000 to 300,000 illegal immigrants entered the United States each year during the 1980's. Robert Reinhold, *Conflicting Figures on Illegal Aliens*, N.Y. TIMES, May 7, 1987, at A16. Thus a very conservative estimate is that 9.5 million immigrants—legal and illegal—entered the United States during the 1980's. The next-highest level of immigration took place from 1901 to 1910, a decade during which 8,795,386 immigrants were admitted into the United States. 1991 STATISTICAL Y.B., *supra*, at 27 tbl. 1.

6. The terms "noncitizens" and "aliens" are used to refer to legal and illegal aliens, collectively.

7. There are three main categories of aliens: legal permanent resident aliens, nonimmigrant aliens, and illegal aliens. The Immigration and Nationality Act defines legal permanent resident aliens as follows: "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (1988). Aliens with a valid nonimmigrant visa such as a tourist or student visa receive permission to stay in the United States temporarily. 8 U.S.C. § 1101(a)(15) (1988 & Supp. III 1991) (listing different types of nonimmigrant aliens). Illegal aliens, sometimes called undocumented workers, include aliens who entered illegally and aliens who stayed after their temporary visas expired. Other aliens, such as otherwise illegal aliens with valid asylum claims pending, fall between the three main categories. This Note will use the term "legal alien" as shorthand for legal permanent resident aliens.

8. SUSAN J. LAPHAM, U.S. BUREAU OF THE CENSUS, THE FOREIGN BORN POPULATION IN THE UNITED STATES: 1990, at 1 tbl. 1 (1992) [hereinafter FOREIGN BORN POPULATION]. The Immigration and Naturalization Service estimated that in October 1992, about 3.4 million illegal aliens were in the United States. *Congressional Commission Calls for Crackdown on Illegal Aliens*, N.Y. TIMES, Oct. 1, 1994, at A8.

9. ETHNIC & HISPANIC BRANCH, U.S. BUREAU OF THE CENSUS, 1990 AGE, NATIVITY, AND CITIZENSHIP FOR THE UNITED STATES, STATES, AND COUNTIES 8 tbl. 1 (1990) [hereinafter AGE, NATIVITY, AND CITIZENSHIP].

10. *Id.* at 5 tbl. 1.

providing legal and illegal aliens with free public schooling, emergency medical care, and beds in state prisons. Both states claim they have spent billions of dollars providing services to aliens, legal and illegal,[11] and have sued the federal government to recoup the money they have spent, claiming the federal government should bear the burden of lax enforcement of the nation's immigration laws.[12]

Not coincidentally, two of the most contested voting rights cases in recent years came from Los Angeles and Dade Counties.[13] A pivotal issue in each case was whether the principle of one person one vote means local districts[14] should contain equal numbers of persons, including citizens and aliens, or only equal numbers of citizens.[15] In both cases, Hispanic[16] plaintiffs claimed the latest reapportionment plan deprived them of their fair share of political power and sued under the Voting Rights Act.[17] Elected officials countered that many Hispanics were noncitizens who should be excluded from the population base for drawing voting districts or calculating compliance with the Voting Rights Act.

The political stakes in such cases are considerable. Excluding noncitizens from the local apportionment base means shifting political power away from

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11. Florida estimates that it spends $884 million a year on schools, hospitals, prisons, and other public services for illegal aliens. Mark Silva, *Florida's Big Tab for Immigration*, MIAMI HERALD, Mar. 13, 1994, at 1A, 20A. California estimates the drain on its budget at $3 billion annually. Daniel M. Weintraub, *Wilson Shifts Tack on Illegal Immigration*, L.A. TIMES, Aug. 25, 1993, at A3. The precise figures are hotly debated. A study by the Urban Institute, a Washington-based research group, concluded that California had overestimated its population of illegal aliens and had also overestimated the amount it spends on the education of illegal immigrant children by $800 million. Deborah Sontag, *Illegal Aliens Put Uneven Load on States, Study Says*, N.Y. TIMES, Sept. 14, 1994, at A14. The same study found that legal and illegal immigrants together are "a boon, not a burden, for the country over all, generating a surplus of $25 billion to $30 billion." *Id.* But immigrants, legal and illegal, pose a financial burden on local governments because most of the taxes immigrants pay go to the federal government while many of the services they receive come from local governments. Larry Rohter, *Revisiting Immigration and the Open-Door Policy*, N.Y TIMES, Sept. 19, 1993, § 4, at 4.

12. Silva, *supra* note 11, at 1A, 20A. Arizona and Texas have also sued the federal government to recover the costs of providing public services to illegal immigrants. Sam Howe Verhovek, *Texas Plans To Sue U.S. over Illegal Alien Costs*, N.Y. TIMES, May 26, 1994, at A10. A federal judge recently dismissed Florida's lawsuit, saying the suit presented a political question. Mireya Navarro, *Florida's Plea for Immigration Relief Fails*, N.Y. TIMES, Dec. 21, 1994, at A20.

13. Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir 1990), *cert. denied*, 498 U.S. 1028 (1991) [hereinafter *Garza*]; De Grandy v. Wetherell, 815 F Supp. 1550 (N.D. Fla. 1992), *aff'd in part and rev'd in part sub nom.* Johnson v. De Grandy, 114 S. Ct. 2647 (1994) [hereinafter *De Grandy*]. *De Grandy* is about state legislative districts but the controversy centered on Dade County. *De Grandy*, 114 S. Ct. at 2652. The Supreme Court has direct appellate jurisdiction over district court decisions in voting rights cases heard by a three-judge panel. 42 U.S.C. § 1971(g) (1988).

14. In this Note, "local" refers to state, county, and municipal government.

15. Another alternative, proposed in the Los Angeles case, is drawing districts with an equal number of voting-age citizens. *See infra* note 38.

16. Some people prefer the term "Latino" to the term "Hispanic," which they feel glorifies the Spanish conquest and overemphasizes their European roots. Mark McDonald, *Term Limits: Hispanic? Latino? A National Debate Proves No One Name Pleases Everyone*, DALLAS MORNING NEWS, Jan. 13, 1993, at 1C Latino is more common in California while Hispanic is popular in Florida. *Id.* This Note uses the term "Hispanic" for simplicity's sake without intending to take sides in the debate over terminology.

17. *Garza*, 918 F.2d at 765; *De Grandy*, 114 S. Ct. at 2651. The Voting Rights Act is codified at 42 U.S.C. §§ 1971–1973b (1988 & Supp. V 1993).

areas with large populations of Hispanics or other immigrant groups. Excluding noncitizens from the apportionment base in Florida, for instance, cuts Dade County's share of the state population and so its entitlement to legislative seats by more than 30%. Such cases are also part of a subtle effort to limit government money flowing to both legal and illegal aliens. Shifting political power from Dade County, for instance, means fewer legislators to demand a fair share of government resources for their county. All of the county's residents, aliens and citizens alike, will suffer as a result.[18]

Apportionment plans such as those in California and Florida provide a ready precedent that may well be invoked frequently in coming years.[19] With the anti-immigrant tide running higher than it has in decades,[20] sweeping both legal and illegal immigrants in its wake, can a push to exclude noncitizens from local apportionment bases be far behind? In this Note, I argue that notwithstanding an early Supreme Court decision granting states considerable latitude to define their apportionment base,[21] excluding only legal aliens from that base violates the Equal Protection Clause. To meet constitutional strict scrutiny, states that want to exclude only legal aliens must demonstrate that more than political or economic expediency underlies their decision; I argue that states cannot carry that burden.

Part I explains why states might be tempted to exclude only aliens from their apportionment base, as opposed to excluding all nonstate citizens, and explores the hidden costs of doing so. Part II lays out the permissive legal framework that grants states wide latitude in defining their apportionment bases and demonstrates that the Supreme Court's decision making alienage a suspect classification[22] effectively limits that permissive framework. Part III sets forth a limited exemption to strict scrutiny for alienage classifications—the political function exception—explains its contours and demonstrates that this doctrine would not permit states to exclude only legal aliens from their apportionment base. Applying strict scrutiny, Part IV argues that states cannot constitutionally exclude only legal aliens from their apportionment base. This Part concludes that states that want to protect their citizens' right to electoral equality can only do so by excluding all outsiders (e.g., nonresident military personnel, out-of-town college students, transients) from their apportionment base; legal aliens cannot be singled out for special treatment.

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18. *See infra* notes 64–73 and accompanying text.

19. No local government currently excludes noncitizens from its apportionment base, but I anticipate that local governments will face growing pressure to exclude noncitizens in the future.

20. *See generally* Al Martinez, *California Elections: In These Violent Times, Fear Finds a Scapegoat*, L.A. TIMES, Nov. 10, 1994, at B1; Deborah Sontag, *Across the U.S., Immigrants Find the Land of Resentment*, N.Y. TIMES, Dec. 11, 1992, at A1; Deborah Sontag, *Calls To Restrict Immigration Come from Many Quarters*, N.Y. TIMES, Dec. 13, 1992, § 4, at 5.

21. Burns v. Richardson, 384 U.S. 73 (1966).

22. Graham v. Richardson, 403 U.S. 365 (1971).

I. THE POLITICS OF EXCLUSION

Putting constitutional issues aside temporarily, this Part outlines the political dilemmas faced by communities with large alien populations, illustrates the pressures that can lead to exclusion apart from a legitimate desire to protect citizens' voting rights, and analyzes the consequences. While it may be politically expedient to exclude only noncitizens from the local apportionment base,[23] doing so ultimately will hurt both legal aliens and their citizen neighbors.[24] Noncitizens who are excluded do not simply disappear but continue to reside in the community just as before, consuming their share of government services. The only clear result of exclusion is that a large number of persons using government services will no longer be represented in the legislature; consequently, their share of the public pie likely will be reduced. The bottom line is that both legal aliens and their citizen neighbors will suffer as everyone competes for a slice of that dwindling pie. Thus, this Part reaches on policy grounds what at first blush seems a counterintuitive conclusion: Local governments should not treat legal aliens any differently than they treat their own citizens in defining their apportionment base. The remainder of this Note reaches a similar conclusion on constitutional grounds.

A. *Two Cases Excluding Aliens from the Population Base*

The Los Angeles County apportionment battle in *Garza v. County of Los Angeles* presents a classic example of what excluding noncitizens from the local apportionment base would mean. In 1988, Yolanda Garza and other Hispanic voters sued the Los Angeles County Board of Supervisors, charging that the supervisors' latest reapportionment plan unfairly diluted the voting power of Hispanic citizens.[25] The federal district court agreed, and when the

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23. Local governments that want to protect their citizens' voting strength should exclude all outsiders from their apportionment base—noncitizens, out-of-town students, nonresident military personnel, incarcerated felons, and similar groups—not just legal aliens. *See infra* notes 135–45 and accompanying text. Thus, this Note does not consider a desire to protect citizens' voting power as a justification for excluding only legal aliens from the local apportionment base.

24. This Part analyzes the policy consequences of the most likely exclusionary proposal: excluding all aliens, legal and illegal, from the local apportionment base. The identical analysis would apply in the unlikely case that a local government tried to exclude only legal aliens from its apportionment base. Another possibility would be to exclude only illegal aliens from the local apportionment base. No local government has tried to do so, however, probably in large part because it is extremely difficult, if not impossible, to count illegal aliens accurately. *See infra* notes 147–56 and accompanying text. Even in this case, similar policy considerations would apply but with less force because illegal aliens receive few government services. Under federal law, local governments can deprive illegal aliens of almost all government benefits, except the right to receive emergency medical care and the right to attend public schools. 42 U.S.C. § 1396b(v)(1)–(3) (1988 & Supp. V 1993); Plyler v. Doe, 457 U.S. 202 (1982).

The legal analysis for proposals to exclude all aliens is similar to the legal analysis for proposals to exclude only legal aliens. *See infra* note 92. The legal analysis, however, would be quite different for proposals to exclude only illegal aliens. *See infra* notes 92–99 and accompanying text.

25. *Garza*, 918 F.2d at 765.

county refused to offer an acceptable plan, the court redistricted on its own in order to create a safe Hispanic seat. A divided panel of the Ninth Circuit upheld the court-ordered redistricting plan that created districts with equal numbers of people but sharply varying numbers of citizens.[26] Such a plan, presented in the table below, was the only way to create a safe Hispanic seat,[27] given the demographics of Los Angeles County in which one in two Hispanic adults was not a citizen in 1990.[28]

District	Residents	Adult Citizen Population
1	1,779,835	707,651
2	1,775,665	922,180
3	1,768,124	1,098,663
4	1,776,240	1,081,089
5	1,780,224	1,088,388

TABLE 1. *Demographic Breakdown of Los Angeles County by District*

The court-ordered apportionment plan showed how two prized American values, electoral equality and equal representation, can conflict in areas with large noncitizen populations. Electoral equality rests on the principle that the voting power of all eligible voters should be weighted equally[29] and requires drawing voting districts to include equal numbers of citizens.[30] The slightly

26. The district court decision is unpublished. The details of the district court plan, however, are summarized in the Ninth Circuit decision. *Id.* at 774 nn.4–5.

27. Petition for Certiorari at 7–8, County of Los Angeles v. Garza, 918 F.2d 763 (9th Cir. 1990), *filed*, 59 U.S.L.W. 3421 (U.S. Nov. 30, 1990) (No. 90-849) ("It is undisputed that if one uses either citizenship or voting age citizenship instead of total population as the apportionment base, one cannot form a majority Hispanic voting age citizen district in 1980 or 1990.").

28. *Garza*, 918 F.2d at 774 nn.4–5. Less than 45% of the Hispanic adults in Los Angeles County were citizens. Petition for Certiorari at 8, *Garza* (No. 90-849). In Dade County, less than 50% of the Hispanic adults were citizens. Appellants' Brief at 19, *De Grandy*, 114 S. Ct. 2647 (No. 92-519).

In *Garza*, Hispanics made up 59.4% of the eligible voters in the safe Hispanic district. *Garza*, 918 F.2d at 778, 779 n.2 (Kozinski, J., concurring and dissenting in part). If the district court had drawn districts with equal numbers of citizens, the district would have contained nearly twice as many eligible voters, and Hispanics would almost certainly not have made up a majority of the district's eligible voters.

29. While it holds a powerful allure in both our political and legal discourse, electoral equality is unattainable in practice. As several commentators have noted, the American winner-take-all system cuts against a commitment to electoral equality, for the votes of people who back the losing candidate are totally discarded. *See, e.g.*, Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1358–61 (1987); *see also* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1087–93 (3d ed. 1992) (explaining what true electoral equality entails).

30. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 563 (1964) ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.").

different concept of equal representation means ensuring that everyone—citizens and noncitizens alike—is represented equally and requires drawing districts with equal numbers of residents.[31] Equal representation is animated by the ideal that all persons, voters and nonvoters alike, are entitled to a political voice, however indirect or muted.[32] These two ideals are usually complementary but lead to divergent results in areas, like Los Angeles and Dade Counties, with large noncitizen populations.

The plan in *Garza* placed equal representation above electoral equality to remedy past discrimination against Hispanic voters. The five-member Los Angeles County Board of Supervisors claimed the district court's plan impermissibly diluted the voting power of non-Hispanic citizens, violating their right to electoral equality, because the number of citizens in three non-Hispanic districts vastly exceeded the number of citizens in the safe Hispanic district. The county argued that in those three districts each citizen's vote was worth less than a vote in the safe Hispanic district.[33] Drawing districts with equal numbers of citizens, however, would have splintered the Hispanic vote. It also would have meant that the total number of residents in the Hispanic district would have far surpassed the number of residents in the other districts to the all-but-certain detriment of the inhabitants of the Hispanic district.

A 1971 redistricting plan for the Los Angeles City Council, a plan rejected by the California Supreme Court nearly two decades before *Garza*, suggests how districts for the Los Angeles County Board of Supervisors would have come out had they been drawn to ensure electoral equality.[34] The following table ranks the districts from that old plan, in descending order, by number of residents:[35]

31. *Id.* at 560–61 ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of *people*, without regard to race, sex, economic status, or place of residence within a State.") (emphasis added).

32. Like electoral equality, equal representation holds a powerful allure in our political and legal discourse but is also a troubling concept because neither political theorists, nor legal commentators, nor Supreme Court Justices have been able to define the concept clearly. *See, e.g.*, Lucas v. General Assembly, 377 U.S. 713, 748–49 (1963) (Stewart, J., dissenting) (discussing theories of representation); REPRESENTATION (J. Roland Pennock & John W. Chapman eds., 1968) (same). Questions remain, including: Do elected officials represent everyone in their districts or only the people who voted for them? Is someone ineligible to vote—a minor or an alien—represented simply by being included in the apportionment base? Are ineligible voters represented vicariously by virtue of their relation to a citizen voter? Is the key value equal representation for individuals or for groups? Is it important to be represented by a particular elected official, the dominant political party, or the legislature as a whole?

33. *See supra* note 28 and accompanying table.

34. *See* Calderon v. City of Los Angeles, 481 P.2d 489, 495 (Cal. 1971). Under the court-rejected 1971 plan, the city council drew districts with an eye to equalizing the number of registered voters per district without worrying about the number of inhabitants per district.

35. *Id.* at 495–96.

District	Residents	Registered Voters
9	260,503	74,624
15	228,814	72,416
1	227,776	79,615
7	205,423	78,550
8	205,385	82,578
12	204,854	81,636
14	189,876	77,276
3	189,723	80,348
6	186,783	79,850
13	183,202	77,114
10	179,649	77,217
11	175,022	82,287
2	164,850	83,275
5	162,123	80,864
4	153,462	75,063

TABLE 2. *Pre*-Garza *Plan Based on Electoral Equality*

The California Supreme Court noted that District 9, which had nearly 70% more inhabitants than District 4, was populated mostly by blacks (many of whom were not registered to vote) and Mexican-Americans (many of whom were not citizens). In rejecting the plan, which the court held was constitutionally suspect since it diminished minority representation,[36] the court stressed the importance of creating districts with a comparable number of total residents:

> [M]uch of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.[37]

36. *Id.* at 495.
37. *Id.* at 494.

Two decades later, the Ninth Circuit employed similar arguments in *Garza*, upholding the district court plan as a justified remedial measure, after concluding that members of the Los Angeles County Board of Supervisors had intentionally splintered the Hispanic vote in order to protect their incumbency.[38] The majority also emphasized that drawing districts with equal numbers of eligible voters but sharply varying numbers of residents would burden the constitutional right of residents in the more populous districts to petition the government for redress of grievances.[39]

Similar to its California counterpart, the Florida redistricting case began in 1992 with a legal challenge lodged by Dade County's increasingly powerful Hispanic community, led by Miguel De Grandy, a Hispanic state legislator.[40] The plaintiffs claimed that the legislature's reapportionment plan violated the Voting Rights Act,[41] arguing that the plan should have created three more safe Hispanic seats in Dade County.[42] In defending the status quo, leaders of the state legislature countered that De Grandy's calculations to determine compliance with Section 2 of the Voting Rights Act were based on the number of Hispanic *residents*, not Hispanic *citizens*.[43] The state argued that creating more safe Hispanic seats beyond those included in the state's plan would provide overrepresentation for Hispanic citizens and underrepresentation for non-Hispanic citizens because of the large Hispanic noncitizen population in

38. *Garza*, 918 F.2d at 770–71. The majority also noted that a California statute establishing an inclusive apportionment base for local election districts meant that legal and illegal aliens had to be included in the county's apportionment base. *Id.* at 774 (citing CAL. ELEC. CODE § 35000 (West 1989 & Supp. 1995)). Judge Kozinski, concurring in part and dissenting in part, agreed with the county that the court plan was unconstitutional, *id.* at 778, 779, and said that if a remedial plan could not be devised with relatively equal numbers of eligible voters and total residents, then the county would probably have to draw its districts to equalize the number of eligible voters, *id.* at 781–85.

39. *Id.* at 774–75. The court noted: "Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative." *Id.* at 774. The court continued: "Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government." *Id.* at 775 It concluded: "'Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.'" *Id.* (quoting *Calderon*, 481 P.2d at 493).

40. *De Grandy*, 114 S. Ct. at 2651.

41. 42 U.S.C. §§ 1971–1973b (1988 & Supp. V 1993).

42. *De Grandy*, 114 S. Ct. at 2652.

43. *Id.* at 1566. Unlike the Los Angeles Board of Supervisors, the Florida legislature did not propose excluding noncitizen Hispanics from the local apportionment base. Rather, the legislature proposed excluding noncitizen Hispanics from the population base used to calculate compliance with Section 2 of the Voting Rights Act, which establishes an effects test for determining if a protected minority group's voting strength is being unfairly diluted. As interpreted in Thornburg v. Gingles, 478 U.S. 30, 50 (1986), the Voting Rights Act establishes a threshold test for any group bringing a Section 2 claim. To meet the threshold test, plaintiffs must demonstrate that they are sufficiently numerous, politically unified, and geographically compact to elect a candidate of their choosing with fairly drawn districts. *Id.* at 50. An unsettled question is whether plaintiffs can rely on data about minority residents, including noncitizens, or must use data about minority citizens alone to establish a Section 2 claim. The Supreme Court did not reach that issue in deciding the Florida case. *De Grandy*, 114 S. Ct. at 2660 n.14.

Dade County.[44] The Supreme Court sidestepped the controversy, deciding the case on other grounds.[45]

Like the Los Angeles case, the Florida litigation was most obviously a political battle, this time pitting Dade County's burgeoning Hispanic community against the dwindling number of non-Hispanic legislators in Dade County and their political allies from central and northern Florida. At stake were the distribution of seats between Hispanics and non-Hispanics in Dade County and the balance of power statewide between Hispanics and non-Hispanics. The litigation was also an economic battle over the distribution of government resources, for a shift in political power inevitably would have altered Hispanics' share of government services and benefits.

B. *The Temptation To Exclude Noncitizens*

As the Los Angeles and Dade County cases suggest, excluding noncitizens from the local apportionment base or from the population base for calculating compliance with Section 2 of the Voting Rights Act is a tempting strategy for incumbent politicians fearful of losing their seats to a growing immigrant community. Such a strategy not only promises to preserve incumbents' seats but can also be politically popular, playing to the anti-immigrant sentiment of the larger political community. Excluding noncitizens has the added political appeal of channeling government benefits away from noncitizens. The stronger the anti-immigrant backlash, the more alluring such a strategy becomes. It is no coincidence that incumbent politicians tried to exclude noncitizen Hispanics in California and Florida, two states in which anti-immigrant fury was so pronounced that it helped propel embattled governors to reelection.[46]

Florida and California are political bellwethers for the country on immigration issues, but they are not unique. An anti-immigrant mood has

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44. Appellants' Brief at 30 n.49, *De Grandy*, 114 S. Ct. 2647 (No. 92-519).

45. *De Grandy*, 114 S. Ct. at 2660 n.14.

46. Wilson's popularity with Californians had plummeted to an all-time low when he began his anti-immigrant campaign, a key to his revived political fortunes. Wilson proposed, among other measures, stripping children of illegal aliens of their right to U.S. citizenship, barring children in the country illegally from attending public schools, and barring illegal aliens from receiving all but emergency medical assistance. *See* James Bornemeier, *Charting Wilson's Transformation on Immigration*, L.A. TIMES, Nov. 2, 1994, at A3; Bill Stall & Patrick J. McDonnell, *Wilson Urges Stiff Penalties To Deter Illegal Immigrants*, L.A. TIMES, Aug. 10, 1993, at A1; Daniel M. Weintraub, *Wilson Ad Sparks Charges of Immigrant-Bashing*, L.A. TIMES, May 14, 1994, at B1; Daniel M. Weintraub, *Wilson Plans Immigration Offensive*, L.A. TIMES, Apr. 20, 1994, at A16.

In Florida, Chiles was also at the nadir of his popularity when he seized on the anti-immigrant sentiment to resurrect himself politically. Chiles successfully pressured President Clinton to curtail the flow of Cuban rafters to Florida. After Clinton halted the influx by interdicting rafters in international waters and directing them to Guantanamo Naval Base, Chiles told a reporter covering Florida's heated gubernatorial campaign: "The only thing I can tell you is if there were 30,000 more rafters in Florida, I'd hate to be me running for office." Richard L. Berke, *Gov. Chiles Seizes the Refugee Issue*, N.Y. TIMES, Sept. 11, 1994, at A1.

seized the nation as a whole.[47] The number of noncitizens is rising sharply in metropolitan areas throughout the country, placing an added strain on government services.[48] Other states already are contemplating following in California's footsteps by adopting their own Proposition 187;[49] they are also considering imitating Florida by deporting illegal aliens serving state jail terms in order to save tax revenues and free up badly needed jail space.[50] The same potent dynamic of demographics and dollars that prompted efforts to exclude noncitizens from the apportionment base in California and from the population base for the Voting Rights Act in Florida could easily prompt similar efforts in other states. Ours is an age dominated by the politics of scarcity, and if states cannot increase the pie, they will be sorely tempted to limit the number of seats at the table.

C. *Policy Arguments Against Excluding Noncitizens*

While politically enticing, excluding noncitizens from the local apportionment base ultimately would hurt not only the noncitizens themselves but also their citizen neighbors by distorting representation. Local governments need an inclusive apportionment base to ensure that citizens and noncitizens alike are represented, however indirectly, and to ensure an equitable distribution of government goods to both citizens and noncitizens. In the past, some states apportioned on a narrow population base such as voters or adult males,[51] but the representative function of the apportionment base was

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47. B. Drummond Ayres Jr., *Anti-Alien Movement Spreading in Wake of California's Measure*, N.Y. TIMES, Dec. 4, 1994, at A1 (noting that supporters of Proposition 187 movement have begun pushing for similar laws in other states with large populations of recently arrived aliens, such as Arizona, Florida, Illinois, New York, and Texas); Richard L. Berke, *Politicians Discovering an Issue: Immigration*, N.Y. TIMES, Mar. 8, 1994, at A19 (noting that polls show that Americans are increasingly worried about economic impact of immigrants and their effect on American culture and that politicians are becoming increasingly outspoken on immigration issues).

48. According to the 1990 census, for instance, 20.9% of the residents in Queens County, New York, were not citizens. FOREIGN BORN POPULATION, *supra* note 8, at 7 tbl. 6. Other areas with large percentages of noncitizens include: San Francisco County, California, 19.7%; Hudson County, New Jersey, 18.2%; Kings County (Brooklyn), New York, 17.1%; El Paso County, Texas, 16%; New York County (Manhattan), New York, 15.5%. *Id.*

49. Ayres, *supra* note 47, at A1, A42.

50. Deborah Sharp, *Florida's Foreign Felons Now Facing Deportation*, USA TODAY, June 30, 1994, at 8A.

51. *See* David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1572 n.176 (1990) (citing IND. CONST. art. IV, § 5 (mandating state legislative apportionment on basis of number of males over 21 years of age; amended in 1984 to apportion by total number of inhabitants)); *see also* VT. STAT. ANN. tit. 17, § 1891 (1982) (apportioning state legislature on basis of voters in previous election; amended in 1981 to apportion on basis of total population).

New York's original constitution, adopted in 1777, limited the apportionment base for the lower house of the state legislature to electors. N.Y. CONST. art. V (1777), *reprinted in* 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 2623, 2629–30 (1909); *see* Ruth C. Silva, *The Population Base for Apportionment of the New York Legislature*, 32 FORDHAM L. REV. 1, 7 (1963). In 1821, the base was broadened to "inhabitants, excluding aliens, paupers, and persons of color not taxed." N.Y. CONST. art. I, § 6 (1821), *reprinted in* THORPE, *supra*, at

generally not undermined because such groups were distributed relatively evenly.[52] Today, all states and local governments have a relatively inclusive apportionment base.[53] Such inclusivity, however, may be jeopardized by exclusionary politics, as *Garza* and *De Grandy* demonstrate.

According to New York's highest court, it is "appropriate" for the apportionment base to differ from and be more inclusive than the pool of eligible voters, because "[t]he goals and objectives of the concepts differ significantly."[54] Inclusion in the pool of eligible voters bestows the right to exercise political power; inclusion in the apportionment base ensures a modicum of representation.[55] Being included in the apportionment base furthers representational equality, ensuring that even persons without the franchise will have their needs and interests taken into account. Hawaii's 1991 Reapportionment Commission recently made a similar point, noting:

> The focus of reapportionment is representation. Voting is merely one of a number of ways in which a person's right to be represented is manifested. The right to representation is a broader right of effective participation in, and relation to, the legislative process, including the right to petition the legislature, the right to bring one's needs to the attention of a particular legislator who has been elected in that district, and the right to be weighed in the composition of the legislature. Those entitled to vote and those entitled to representation are not necessarily the same.[56]

Those included in the apportionment base but unable to vote cannot influence legislators directly; rather, they can only hope to sway legislators by virtue of

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2639, 2641. In 1846, the plan was revised again by dropping the exclusion against paupers and increasing the number of Senate districts. Silva, *supra*, at 7. The 1846 revision was a political compromise, an effort to give New York and Kings Counties more power without giving them too much power. Counting all inhabitants would have greatly increased the political power of these counties, where many blacks and aliens lived; continuing to count only electors would have disproportionately disadvantaged these counties. *Id.* at 7–8.

52. *But see* Burns v. Richardson, 384 U.S. 73, 90 (1966) (stating that Oahu's share of Hawaii's total population was 79% while its share of registered voters was 73%).

53. Some states or local governments, however, do exclude nonresident students or out-of-state military personnel. *See infra* notes 157–59 and accompanying text.

54. Longway v. Jefferson County Bd. of Supervisors, 628 N.E.2d 1316, 1320 (N.Y. 1993).

55. A similar point was made during the congressional debates over setting the Fourteenth Amendment's formula for apportioning congressional districts. The congressional debates indicated that Congress viewed apportionment as reflecting all people, not just voters. Senator Johnson of Maryland, responding to one of his colleagues, observed:

> The honorable member seems to suppose that representation and the franchise are identical. They are as different as light from darkness. The Constitution says so; your own amendment proclaims it. You say that representation is to depend upon numbers. So did your fathers say so. They said it and you have followed their teaching, because they said it was a right to be represented, but not a right to vote.

Marsha Bilzin, Note, *Reapportionment on the Sub-State Level of Government: Equal Representation or Equal Vote?*, 50 B.U. L. REV. 231, 243 (1970) (citing CONG. GLOBE, 39th Cong., 1st Sess. 3029 (1866)).

56. STATE OF HAWAII 1991 REAPPORTIONMENT COMM'N, FINAL REPORT AND REAPPORTIONMENT PLAN 22 (1992) (hereinafter HAWAII REAPPORTIONMENT COMM'N).

their relationship to an eligible voter or their mere presence in a legislator's district. Such representation is called virtual representation.[57]

American colonists scorned the very notion of virtual representation when the British claimed Americans were represented in the British parliament by virtue of their relation to English voters.[58] Virtual representation is constitutionally barred today as a substitute for direct representation for citizens eligible to vote.[59] But virtual representation is esteemed and perhaps even required as a way of giving voice to some nonvoters who would otherwise not be represented.[60] Including citizen children in the local apportionment base, for instance, is not only desirable[61] but is also probably required constitutionally,[62] even though citizen children obviously cannot vote. For legal aliens virtual representation is important because it means that they will be accounted for in the legislature by inclusion in the population base—the constituency for which the legislator secures government benefits.

Noncitizens do not have a constitutional right to be included in the local apportionment base and thus do not have a constitutional right to virtual representation. In *Burns v. Richardson*, the Court afforded local governments broad latitude in defining their apportionment base to include or exclude outsiders such as noncitizens, out-of-town students, nonresident military personnel, transients, and convicted felons.[63] In essence, the Court allowed local governments broad discretion to choose between two radically different visions: an exclusionary apportionment base that protects citizens' right to voting equality and an inclusive apportionment base that ensures representation for everyone, even those ineligible to vote.

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57. JOHN HART ELY, DEMOCRACY AND DISTRUST 161 (1980).

58. EDMUND S. MORGAN, INVENTING THE PEOPLE 239–41 (1988).

59. *See* Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Inside-Outsider"*, 134 U. PA. L. REV 1291, 1312–13 (1986). Until passage of the Nineteenth Amendment in 1920, women had only virtual representation. *See* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). Similarly, until passage of the Twenty-Sixth Amendment, 18- to 21-year-olds enjoyed only virtual representation. *See id.* amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

60. Virtual representation is required at the federal level by the Enumeration Clause as amended by the Fourteenth Amendment. U.S. CONST. art. 1, § 2, cl. 3; U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of the persons in each State, excluding Indians not taxed."). Thus persons ineligible to vote such as aliens and citizen children are accorded virtual representation in Congress.

61. *Cf.* HAWAII REAPPORTIONMENT COMM'N, *supra* note 56, at 22.

62. No Supreme Court case is squarely on point, but several cases suggest that citizen children must be included in the local apportionment base. *Cf.* Gaffney v. Cummings, 412 U.S. 735, 747 (1973) (implying that children should not be excluded from local districts even if disparity in numbers of children in districts leads to disparity in number of potential voters in each district); Burns v. Richardson, 384 U.S. 73, 92 (1966) (omitting children from list of groups that can be excluded from local apportionment base). At this time, no state or local government excludes minor children from its apportionment base.

63. *Burns*, 384 U.S. at 92.

Legal aliens may be excluded from the local apportionment base, provided their exclusion is not discriminatory.[64] More than other groups of outsiders, however, legal aliens warrant inclusion in the apportionment base for policy reasons, both for their own sake and for the good of their citizen neighbors. Legal aliens contribute to the community as much as citizens do. Legal aliens pay all the same taxes,[65] and were even conscripted into the military until the draft was abolished.[66] Like citizens, legal aliens depend on public schools, hospitals, and libraries and rely on local government for police service, fire protection, and garbage pickup. Many legal aliens sink roots deeply into the local communities and may even spend the remainder of their lives there.[67] For nearly all intents and purposes, legal aliens are indistinguishable from their citizen neighbors. Hence, legal aliens should be included in the local apportionment base in recognition both of their contributions to the community and their dependence on the community.

Extending representation to legal aliens redounds to the benefit of the entire community.[68] In Dade and Los Angeles Counties, where one in three

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64. *See infra* notes 130–60 and accompanying text.

65. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1445 (1993) ("[L]egal, resident aliens pay exactly the amount of local property taxes, federal income taxes, state income taxes and state and local sales taxes that they would pay if they were citizens." (citations omitted)). Illegal aliens are not exempt from paying taxes, and indeed pay billions. One study found that in the seven states with the largest populations of illegal aliens, such immigrants pay "$1.9 billion in state and local income taxes, sales taxes and property taxes" and "some $3.4 billion in Federal income taxes." Sontag, *supra* note 11, at A14.

While suffrage is no longer limited to property owners and so merely paying taxes does not give legal aliens a strong claim that they should be allowed to vote, it does provide a more compelling case for according them representation. After all, one of the rallying cries of the American Revolution was "No taxation without representation." MORGAN, *supra* note 58, at 239–41.

66. The Selective Service Act of 1948, ch. 625, § 6(a), 62 Stat. 604, 609, exempted "[persons] residing in the United States and who have not declared their intentions to become citizens" from the Act's registration requirement. The Selective Service Act was amended by Act of June 19, 1951, ch. 144, sec. 2(c)–(d), §§ 3–4(a), 65 Stat. 75, 76, which removed this exemption for permanent resident aliens, regardless of whether they had declared their intention to naturalize. The conscription requirements are now codified at 50 U.S.C. app. § 454(a) (1988).

67. The Immigration and Naturalization Service found that 39.6% of all immigrants who entered the United State lawfully in 1977 had naturalized as of end fiscal year 1992. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1993 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 130 tbl. L (1993). Further, a survey of Latino immigrants found that 76% of all Mexicans questioned reported that they intended to remain in the United States permanently. RODOLFO O. DE LA GARZA ET AL., LATINO VOICES 155 (1992).

68. Since legal aliens are integrated into the local community, some commentators argue that legal aliens should be allowed to vote, at least in local elections. States are free to decide whom to allow to vote, within constitutional and statutory limits. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."). Aliens voted in many states in the union in the 19th and early 20th centuries. The last state to take the right to vote away from legal aliens did so in 1928. *See* Gerald L. Neuman, *We Are the People; Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 334 (1992) (concluding that alien suffrage is constitutionally permissible in United States); Raskin, *supra* note 65, at 1394, 1466–67 (urging that aliens be allowed to vote in local elections); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right To Vote?*, 75 MICH. L. REV. 1092 (1977) (proposing suffrage for legal resident aliens).

and one in four adults are noncitizens respectively, excluding noncitizens from the local apportionment base would result in serious inequities in the delivery of many services.[69] Even if excluded from the apportionment base, noncitizens would remain physically present, swelling the real size of the districts where they live. Citizens and noncitizens in the larger districts would likely get short shrift in the legislature, as one of the judges in *Garza* noted, for the real size of their district would increase but the resources devoted to their district would not. "[A]ssuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, [creating equally populous districts] ensures that constituents are not afforded unequal government services depending on the size of the population in their districts."[70]

Indeed, excluding noncitizens from the apportionment base would impose greater hardships on a community than would excluding military personnel, prison and psychiatric inmates, or college students. Such groups lead a more insular, self-contained existence than legal aliens, and thus do not deplete the state's resources to the same degree as legal aliens do. Prison inmates or institutionalized psychiatric patients, for instance, place almost no demand on generally available local services and contribute nothing to the local community. Similarly college students living in dormitories and military personnel living on federal bases most often lead lives apart from the community, drawing on community services much less than the average area resident does. In addition, many of these groups enjoy special services, such as military hospitals or private university police, not paid for through general tax revenues. Thus, from a policy perspective, legal aliens should be the last group excluded from the local apportionment base, not the first one.

The Alaska Supreme Court emphasized the isolated nature of military life in upholding the state's plan to exclude only nonresident military personnel from the apportionment base for state legislative districts in 1973. The court said the "fundamental reason" for excluding nonresident military personnel was "their want of any contact with the state beyond mere presence."[71] To buttress its position, the court reviewed the common law rule, later enacted

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69. With the demise of the rights/privileges distinction, states cannot exclude legal aliens from access to government services without triggering strict scrutiny. See *infra* notes 100–07 and accompanying text.

70. *Garza*, 918 F.2d at 778, 781 (Kozinski, J., concurring in part and dissenting in part). Ironically, Kozinski favored districts with equal numbers of citizens over districts with equal numbers of inhabitants because he argued that electoral equality was more important than equal representation. *Id.* at 782.

New York's high court made a similar point about the delivery of government services in rejecting a demand to exclude outsiders from the local apportionment base:

> Military persons, children, mental patients and prisoners all affect the social and economic character of their environments. Their impact results in employment opportunities and contributes to the tax base. They also use services provided by the municipalities. Thus, their inclusion for apportionment purposes makes sense on several levels.

Longway v. Jefferson County Bd. of Supervisors, 628 N.E.2d 1316, 1318 (N.Y. 1993)

71. Groh v. Egan, 526 P.2d 863, 871 (Alaska 1974).

into a federal statute,[72] that people who enter the military do not lose their prior residence unless they take affirmative steps to become residents of the state in which they are stationed. The court observed, "[a]s a result of the common and statutory law and the economics of military life, the serviceman and his family may remain completely aloof from the state of assignment, neither utilizing its services nor contributing to its treasury or public life."[73]

Legal aliens, by contrast, partake of life in the community just as much as citizens, paying all taxes and drawing on all community services. Thus, the ethical and policy arguments for including legal aliens in the local apportionment base are quite strong.

II. THE LEGAL FRAMEWORK

The decision to include or exclude noncitizens does not take place in a legal vacuum. The Constitution requires inclusion of all inhabitants in the apportionment base for congressional districts but does not specify procedures for drawing local districts or deciding who must be included.[74] For local districting, the Court has invoked the Equal Protection Clause of the

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72. 50 U.S.C. app. § 574(1) (1988 & Supp. III 1991). This rule developed to prevent military personnel from facing the burden of double taxation.

73. *Groh*, 526 P.2d at 872. Alaska's experience is not unique. Hawaii has found that only 3% of the military officers stationed in Hawaii choose to become state citizens. HAWAII REAPPORTIONMENT COMM'N, *supra* note 56, at 24.

74. For the federal apportionment base, the rule follows from the Enumeration Clause as modified by the Fourteenth Amendment:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of the persons in each State, excluding Indians not taxed."). The legislative histories of the original Enumeration Clause and of its replacement, Section 2 of the Fourteenth Amendment, show that ineligible voters and noncitizens were intentionally included in the congressional apportionment base. Federation for Am. Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 576 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" To Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 46–54; Note, *A Territorial Approach to Representation for Illegal Aliens*, 80 MICH. L. REV. 1342, 1356–57 (1982) [hereinafter *Territorial Approach*]. Lower courts have cited that history in ruling that congressional districts must be apportioned on the basis of total population, excluding only foreign tourists and foreign diplomats living on embassy grounds. In twin court rulings about the 1980 and 1990 censuses, courts found that even illegal aliens, arguably the group with the weakest claim to be included in the American political system, must be counted for congressional apportionment. *See also* Ridge v. Verity, 715 F. Supp. 1308, 1321 (W.D. Pa. 1989) (upholding district court's grant of summary judgment on grounds that plaintiffs failed to meet injury-in-fact and redressability elements necessary for standing to challenge proposed inclusion of illegal aliens in 1990 census); *FAIR*, 486 F. Supp. at 576. *But cf.* Dennis L. Murphy, Note, *The Exclusion of Illegal Aliens from the Reapportionment Base: A Question of Representation*, 41 CASE W. RES. L. REV. 969 (1991) [hereinafter *Question of Representation*] (arguing that Congress can and should pass legislation excluding illegal aliens from congressional apportionment base). *FAIR* and *Ridge* make it clear that legal aliens must, *a fortiori*, be included in the congressional reapportionment base.

Fourteenth Amendment,[75] not the Enumeration Clause, to derive the one-person, one-vote mandate because the Constitution imposes only indirect constraints on states' electoral practices.[76] The Court has interpreted that silence as meaning that local governments can exclude aliens, nonresident military personnel, and out-of-town students from their apportionment base.[77] Under that permissive framework, local governments could exclude legal aliens subject only to rational basis review.[78] In 1971, however, the Court declared alienage a suspect classification, automatically triggering strict scrutiny and preventing states from excluding only aliens from their apportionment base without compelling justification.

The Court's local apportionment cases reflect two competing models for applying equal protection doctrine to defining the local apportionment base. Unfortunately, the Court has endorsed both models as if they were interchangeable.[79] As discussed in the previous Part, the two models—one favoring electoral equality, the other equal representation—can lead to sharply different results in areas with large noncitizen populations. Under the broad framework established in *Burns v. Richardson*, however, either is constitutionally permissible.[80]

The question in *Burns* was whether Hawaii could draw legislative districts based on voter registration rolls, rather than overall population figures. Hawaii contended that including Hawaii-based military officers, most of whom were neither permanent state residents nor registered voters, would distort the apportionment process by unfairly favoring areas with military bases.[81] The Court agreed and declared that states should be afforded broad deference in defining their apportionment base:

> [T]his Court [has never] suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to

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75. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 556–61 (1964).

76. *See* Burns v. Richardson, 384 U.S. 73, 91–92 (1966) (indicating that states' choices to include or exclude aliens, transients, and other such groups from apportionment base do not, of themselves, violate constitutional mandates).

77. *Id.*

78. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) (specifying rational basis review standard).

79. For discussions of the ambiguity in the Court's pronouncements, see *Garza*, 918 F.2d. at 778, 780–82 (Kozinski, J., concurring in part and dissenting in part); Bilzin, *supra* note 55, at 238–47; John B. Manning Jr., Case Comment, *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*—Garza v. County of Los Angeles, 25 SUFFOLK U. L. REV. 1243, 1245–48 (1991); Dennis L. Murphy, Note, Garza v. County of Los Angeles: *The Dilemma over Using Elector Population as Opposed to Total Population in Legislative Appointment*, 41 CASE W. RES. L. REV. 1013, 1016–18 (1991).

80. 384 U.S. at 90–92.

81. *See id.* at 90–91.

> include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.[82]

This passage indicates that local districts, unlike congressional districts, need not be based on overall population figures. The Court explicitly disavowed ever implying in earlier decisions that aliens and other groups whose members are not entitled to vote must be included in the local apportionment base.[83] The Court clearly indicated that state citizenship[84] or federal citizenship is a permissible basis for local apportionment.[85] Subsequent lower court cases support this conclusion.[86] By establishing that noncitizens do not enjoy a fundamental right to be represented in the apportionment base,[87] *Burns* set a lenient standard of review. Under *Burns*, governments must only show that their policy is rationally related to a legitimate state goal—the most permissive strand of the Court's equal protection jurisprudence[88]—in order to justify excluding any outsider group.

Five years after granting local governments considerable latitude to exclude noncitizens from their apportionment base in *Burns*, the Court declared alienage a suspect classification in *Graham v. Richardson*.[89] Because state action on the basis of a suspect classification automatically triggers strict scrutiny, the Court's decision in *Graham* modified its holding in *Burns*—a state may constitutionally exclude all outsiders, but it cannot single out aliens for particular treatment without a compelling state interest.[90] A decade later in *Plyler v. Doe*, the Court clarified that illegal aliens, in contrast to legal aliens, are not a constitutionally protected group.[91] Applied to the *Burns* and

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82. *Id.* at 92 (footnote omitted).

83. *Id.*

84. State citizenship, as the Court used the term, would not include either aliens or citizens of another state who were living in Hawaii but had not become Hawaii residents. *See id.* at 92, 94.

85. *Id.* at 95 ("It is enough if it appears that the distribution of registered voters approximates distribution of state citizens or another permissible population base.").

86. *See, e.g.*, Bacon v. Carlin, 575 F. Supp. 763, 764 (D. Kan. 1983) (upholding Kansas apportionment plan that excluded aliens, nonresident military personnel, and out-of-town college students), *aff'd*, 466 U.S. 966 (1984); Winter v. Docking, 373 F. Supp. 308, 311 (D. Kan. 1974) (same).

87. *Burns*, 384 U.S. at 92.

88. *See, e.g.*, Heller v. Doe *ex rel.* Doe, 113 S. Ct. 2637, 2642 (1993) (noting broad deference accorded to legislative classifications subject to rational basis review).

89. 403 U.S. 365 (1971).

90. While states cannot draw classifications based on alienage without triggering strict scrutiny, the Supreme Court permits the federal government to draw alienage classifications subject only to limited review in recognition of the federal government's plenary powers over immigration. *See* Fiallo v. Bell, 430 U.S. 787, 791–92 (1977); Hampton v. Mow Sun Wong, 426 U.S. 88, 101–02 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 82–84 (1976); *see also* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 69 n.92 (1985). Even the federal government, however, cannot exclude aliens from the federal apportionment base, although the prohibition stems from the Enumeration Clause rather than the Equal Protection Clause. *See supra* note 74 and accompanying text.

91. Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) ("We reject the claim that 'illegal aliens' are a 'suspect class.'"). The *Plyler* Court, however, held that illegal aliens are entitled to minimum protection

Graham framework, *Plyler* suggests that a local government could exclude illegal aliens from its apportionment base subject only to rational basis review. If that government sweeps too widely, attempting to exclude both legal and illegal aliens, however, its plan would face strict scrutiny.[92]

To pass strict scrutiny, a government must show that its proposal is necessary to serve a compelling state goal and that it does so by the least restrictive means possible.[93] That rigorous showing is designed to prevent the government from unjustifiably burdening the exercise of fundamental rights or from impermissibly discriminating against members of a suspect class such as legal aliens who are politically vulnerable because they are not entitled to vote.[94]

Strict scrutiny is usually "'strict' in theory and fatal in fact,"[95] while the Court rarely invalidates legislation under rational basis review.[96] Thus, *Graham* and *Plyler* together mean that local governments would almost certainly be permitted to exclude illegal aliens and barred from excluding legal aliens; that is, if alienage were a typical suspect class. In *Sugarman v. Dougall*, however, the Court announced the political function exception to strict scrutiny for alienage classifications.[97] The Court held that states could constitutionally exclude legal aliens from political or government employment that "go[es] to the heart of representative government" without triggering strict scrutiny.[98] Since creating the political function exemption in 1973, the Court has not upheld a single alienage classification that was subjected to strict scrutiny nor struck down a single alienage classification that was encompassed by the political function exemption.[99] Thus, a legal battle over a plan to exclude

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under equal protection review. *Id.* at 210–13.

92. A court reviewing a plan to exclude both legal and illegal aliens could conceivably divide the proposal into component parts and subject each to the appropriate level of scrutiny. The Court has heard only one equal protection challenge to an alienage classification since it declared in *Plyler* that illegal aliens do not constitute a suspect class. In Bernal v. Fainter, 467 U.S. 216 (1984), the Court scrutinized a Texas law that discriminated against legal and illegal aliens alike by requiring that notary publics be citizens. The Court analyzed the statute under strict scrutiny, and did not treat legal and illegal aliens separately.

93. *See, e.g.*, *Plyler*, 457 U.S. at 217 ("With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the state to demonstrate that its classification has been precisely tailored to serve a compelling government interest.").

94. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451 (2d ed. 1988). As the Court has noted: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

95. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

96. *Id.*; *see also* Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1787 (1992).

97. 413 U.S. 634, 647–49 (1973).

98. *Id.* at 647–48.

99. *Compare* Bernal v. Fainter, 467 U.S. 216 (1984) (applying strict scrutiny and striking down alienage classification); Nyquist v. Mauclet, 432 U.S. 1 (1976) (same); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (same); *In re* Griffiths, 413 U.S. 717 (1973) (same); *Sugarman*, 413 U.S. 634 (same) *with* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (finding political function exception applies and

noncitizens from the apportionment base would likely turn on whether the political function exception applied.

III. THE POLITICAL FUNCTION EXCEPTION

The Court's political function exception only covers laws that exclude legal aliens from holding important elected or appointed government positions. In that political arena, the Court has decided not to treat alienage classifications as inherently suspect since they serve a valid state goal by limiting political participation to people who are full members of the body politic. This Part argues that inclusion in the apportionment base does not entitle aliens to hold important elective or appointed government office and so does not fall within the political function exception.

To decide whether the political function exception applies to an exclusion of legal aliens, it is helpful to place the doctrine in historical context. Before the Court made aliens a suspect class in *Graham*, the Court embraced a special public interest doctrine[100] that allowed states to discriminate against aliens when dispensing "privileges" such as owning real property,[101] hunting,[102] fishing,[103] bearing arms,[104] and entering licensed professions.[105] When states were enforcing "rights," primarily the right to hold private jobs in the "common occupations of the community," however, the Court struck down employment classifications based on alienage.[106] In *Graham*, the Court rejected the special public interest doctrine as part of a dated and discredited rights/privileges distinction and declared alienage a suspect classification for all state action.[107]

While this opinion standing alone would have permanently extinguished the public interest doctrine, the Court resurrected limited state power to draw alienage classifications only two years later in *Sugarman v. Dougall*.[108] In that case, the Court replaced the discredited rights/privileges distinction with a new dichotomy between the economic and political spheres. The thrust of the

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upholding alienage classification); Ambach v. Norwick, 441 U.S. 68 (1979) (same); Foley v. Connelie, 435 U.S. 291 (1978) (same).

100. The most famous exposition of the public interest doctrine is found in an opinion by then Judge Cardozo writing for New York State's high court in People v. Crane, 108 N.E. 427, 429–30 (N.Y.), *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915).

101. Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923); Hauenstein v. Lynham, 100 U.S. 483 (1879).

102. Patsone v. Pennsylvania, 232 U.S. 138 (1914).

103. McCready v. Virginia, 94 U.S. 391 (1876).

104. *Patsone*, 232 U.S. at 143, 146.

105. Elizabeth Hull, *Resident Aliens and the Equal Protection Clause: The Burger Court's Retreat from* Graham v. Richardson, 47 BROOK. L. REV. 1, 10 (1980).

106. Traux v. Raich, 239 U.S. 33, 41 (1915).

107. Graham v. Richardson, 403 U.S. 365, 374–76 (1971).

108. 413 U.S. 634 (1973).

Court's pronouncement was that economic classifications based on alienage would be subjected to strict scrutiny while political classifications barring aliens from holding key positions in the body politic would be subject only to rational review in recognition of the state's constitutional prerogatives as a sovereign government. The *Sugarman* Court defined its new doctrine narrowly. It held that states could set citizenship requirements that would apply "to persons holding state elective or important nonelective executive, legislative, and judicial positions" filled by "officers who participate directly in the formulation, execution, or review of broad public policy" because such officials "perform functions that go to the *heart of representative government.*"[109] At issue in *Sugarman* was a state statute barring aliens from applying to competitive civil service positions. The Court refused to apply the political function exception because many, if not most, of the jobs covered by the competitive class did not entail key government functions.[110]

Several years later the Court enlarged the scope of the political function exception by extending the range of nonelective jobs that "go to the heart of representative government."[111] Over bitter dissents, the Court upheld statutes prohibiting legal aliens from working as state troopers[112] and as public school teachers,[113] emphasizing the discretion and influence wielded by these government officials. The dissenting Justices argued that the Court's decisions were irreconcilable with *Sugarman*.[114] Commentators also charged the Court with inconsistency.[115] The Court itself acknowledged that its decisions "regarding the permissibility of statutory classifications involving legal aliens have not formed an unwavering line."[116]

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109. *Id.* at 647 (emphasis added).

110. *Id.* at 642–43. In a closely related case, *In re Griffiths*, the Court also limited the reach of the political function exception, rejecting Connecticut's assertion that the doctrine justified barring aliens from taking the state bar exam. 413 U.S. 717 (1973). "It in no way denigrates a lawyer's high responsibilities to observe that the powers to sign writs and subpoenas, take recognizances, [and] administer oaths hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Id.* at 724 (internal quotation marks omitted).

111. *Sugarman*, 413 U.S. at 647.

112. Foley v. Connelie, 435 U.S. 291, 297 (1978) ("The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.").

113. Ambach v. Norwick, 441 U.S. 68, 73–74 (1979) ("[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government.").

114. *See, e.g.*, *Foley*, 435 U.S. at 310 (Stevens, J., dissenting) (saying he could not fathom how "inexplicably, every state trooper is transformed into a high ranking, policymaking official").

115. Hull, *supra* note 105, at 26; Michael J. Perry, *Modern Equal Protection*, 79 COLUM. L. REV. 1023, 1064 (1979); David F. Levy, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070, 1091 (1979); Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1518 (1979); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1406 (1983) [hereinafter *Developments*]; Frederick D. Unger, Recent Decision, 31 EMORY L.J. 707, 738 (1982) (discussing Cabell v. Chavez-Salido, 454 U.S. 432 (1982)).

116. *Ambach*, 441 U.S. at 72.

The Court attempted to reconcile its conflicting precedents and clarify the scope of the political function doctrine in *Cabell v. Chavez-Salido*.[117] In deciding whether a state could permissibly condition employment as a probation officer on citizenship, the Court expounded a two-part test:

> *Sugarman* advised that a claim that a particular restriction on legally resident aliens serves political and not economic goals is to be evaluated in a two-step process. First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, execution, or review of broad public policy" and hence "perform functions that go to the heart of representative government." We must therefore inquire whether the "position in question . . . involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."[118]

Underlying the second prong of the test—determining whether an official's function goes to the heart of representative government—is the Court's view that citizens, as full members of the body politic, should not be under the direct or indirect control of noncitizens. The determinative factor in applying the second prong is whether or not a particular position entails the exercise of authority over citizens. If it does, eligibility can be limited to citizens.[119] Applying its two-part test, the *Cabell* Court held that since probation officers exercise the state's sovereign power over citizen probationers, that position comes within the ambit of the newly clarified doctrine.[120]

Even under the most expansive reading of the *Cabell* test, however, the political function exception does not extend to a statute barring legal aliens

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117. 454 U.S. 432, 434 (1982).

118. *Id.* at 440–41 (citations omitted) (quoting Foley v. Connelie, 435 U.S. 291, 296 (1978)).

119. *Id.* at 445 ("Looking at the functions of California probation officers, we conclude that they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens."); *see also* Foley v. Connelie, 435 U.S. 291, 296 (1978) (citing Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd*, 426 U.S. 913 (1976)) (approving lower court decision barring aliens from serving as grand jurors or petit jurors because of power jurors exercise over defendants); Skafte v. Rorex, 553 P.2d 830 (Colo. 1976) (holding that resident aliens were not entitled to vote in local school board elections), *appeal dismissed*, 430 U.S. 961 (1977).

120. Since *Cabell*, the Court has not tried to provide an operational definition of the political function exception again, and has, in fact, heard only one other case focusing directly on the doctrine. In *Bernal v. Fainter*, a case about a citizenship requirement for notary publics, the Court cited the *Cabell* test approvingly, and explained the political function exception this way: "This exception . . . applies to laws that exclude aliens from positions intimately related to the process of democratic self-government." 467 U.S. 216, 220 (1984) (finding states cannot bar aliens from serving as notary publics). The Court also cited the political function doctrine in Gregory v. Ashcroft, 111 S. Ct. 2395, 2401–02 (1991), as indirect support for its holding that states may set qualifications for state judges.

from the local apportionment base. Aliens included in the apportionment base do not hold "elective or important nonelective executive, legislative or judicial positions"[121] no matter how capaciously one interprets the words "elective," "nonelective," or "important." Thus the political function exception does not apply, and a plan to exclude legal aliens from the local apportionment base should trigger strict scrutiny.

Indeed, the only Supreme Court case to consider whether the political function exception should apply to an alienage classification that did not entail a job or profession confirms this narrow reading. In *Nyquist v. Mauclet*,[122] the Court fleshed out the vague contours of the doctrine in deciding an issue similar to that presented in this Note. In that case, the Court rejected New York's assertion that a law restricting college scholarships to citizens should be covered by the political function exception because of the state's interest in educating potential voters.[123] The Court said:

> [T]he Court [has] recognized that the State's interest "in establishing its own form of government, and in limiting participation in that government to those who are within the basic conception of a political community" might justify some consideration of alienage. But as *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters, or of "elective or important nonelective" officials "who participate directly in the formulation, execution, or review of broad public policy."[124]

The Court's holding and language in *Nyquist* confirmed that the political function exception only extends to people who exercise important decision-making powers.[125] Aliens included in the apportionment base, however, exercise no such power.

No judicial opinion has applied the political function exception to anything but an alienage classification requiring citizenship as a prerequisite for entry into certain jobs or professions.[126] Invoking the doctrine to justify a legislative plan to exclude legal aliens from the local apportionment base would therefore be unprecedented and unjustifiable. It would also fly in the

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121. *Cabell*, 454 U.S. at 440 (citing Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

122. 432 U.S. 1 (1977).

123. *Id.* at 9–10.

124. *Id.* at 11 (footnote omitted) (quoting *Sugarman*, 413 U.S. at 642, 647 (citing Dunn v. Blumstein, 405 U.S. 330, 344 (1972))).

125. *Cf.* Gregory v. Ashcroft, 111 S. Ct. 2395, 2401–02 (1991) (upholding state authority to set citizenship qualifications for its judges, describing political function precedents as "stand[ing] in recognition of the authority of the people of the States to determine the qualifications of their most important government officials") (footnote omitted).

126. *See* Koh, *supra* note 90, at 74 n.114, 75 n.116 (citing lower court cases in which political function exception did not apply and those in which it did); *Developments*, *supra* note 115, at 1404 n.35, 1405 n.44 (same).

face of the Court's insistence that the political function exception not be read expansively: "We emphasize, as we have in the past, that the political-function exception must be narrowly construed; otherwise the exception will swallow the rule and depreciate the significance that should attach to the designation of a group as a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate."[127]

IV. STRICT SCRUTINY IN PRACTICE

Since the political function exception does not apply, proposals to exclude only legal aliens from the local apportionment base must pass strict scrutiny.[128] Under that standard, the Court strikes down "particular political outcomes as insufficiently justified, either for their looseness of fit between means and ends, or for the weakness of the interest they purport to serve."[129] To pass strict scrutiny the state must satisfy a two-part test by showing that its classification: (1) serves a compelling state interest, and (2) is the most narrowly tailored means to achieve that goal. With one exception, the justifications for excluding legal aliens from the local apportionment base do not constitute a compelling state interest and thus fail the first prong. The one exception is to avoid dilution of citizens' voting power. This Part argues that even if a state claims to be excluding noncitizens from its apportionment base to protect citizens' electoral equality, a statute excluding only legal aliens, rather than all "outsider" groups, would fail the second prong of strict scrutiny analysis. Because of the "looseness of fit" between the state's chosen means and its stated end, the state could not demonstrate its statute was narrowly tailored to further its stated goal.

While legal aliens do not have a constitutional right to be included in the local apportionment base,[130] they do have a legal right to equal access to government services. A local government that excludes legal aliens from the apportionment base in order to deprive them of government benefits would be trying to accomplish indirectly what the Court has barred it from doing directly. The Court has not only struck down the old public interest doctrine that once was invoked to justify discriminatory treatment,[131] but has also barred local governments from burdening legal aliens under the federal preemption doctrine because of the national government's plenary powers over immigration matters.[132] Excluding legal aliens from the apportionment base

127. Bernal v. Fainter, 467 U.S. 216, 222 n.7 (1984) (citation omitted).

128. Similarly, local governments that want to exclude only legal aliens from the population base for determining violations of Section 2 of the Voting Rights Act must also meet strict scrutiny.

129. TRIBE, *supra* note 94, § 16-6, at 1453.

130. *See supra* note 63 and accompanying text.

131. *See* sources cited *supra* notes 100–07.

132. Toll v. Moreno, 458 U.S. 1, 11 (1982) (citing Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)); Graham v. Richardson, 403 U.S. 365, 376–80 (1971). Not only has Congress chosen not to

to achieve the same impermissible purpose once served by the public interest doctrine would similarly fail.

Only one state justification for exclusionary apportionment laws is sufficiently compelling to satisfy the first prong of the strict scrutiny test: preventing dilution of citizen voting power. The Court has stressed repeatedly, in the most emphatic of terms, the importance of ensuring that citizens' votes count equally. In *Reynolds v. Sims*, the Court declared, "To the extent that a citizen's right to vote is debased, he is that much less a citizen."[133] Similarly, the Alaska Supreme Court concluded that excluding nonresident military personnel from the local apportionment base could pass strict scrutiny because doing so served "a compelling state interest, namely, the prevention of the dilution of its residents' voting strength."[134]

Even a state that says its apportionment plan is necessary to prevent dilution of citizens' voting power still must satisfy the second prong of strict scrutiny analysis. One commentator explained the purpose animating the second prong's requirement for a tight fit between means and ends this way:

> The "special scrutiny" that is afforded suspect classifications . . . insists that the classification in issue fit the goal invoked in its defense more closely than any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislators actually had in mind. If that goal cannot be invoked because it is unconstitutional, the classification will fall. Thus functionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of "flushing out" unconstitutional motivation . . . .[135]

Under this test, a local government's assertion that it is excluding only legal aliens from its apportionment base in order to avoid debasing citizens' voting strength would be flushed out as discriminatory. A government sincerely trying to avoid dilution of its citizens' voting strength should not care whether someone is a legal alien from Mexico, a student from Mississippi, or a soldier from Missouri. All are outsiders; all occupy a place in the apportionment base that might otherwise be filled by a citizen. A local government that genuinely wants to protect its citizens' voting power, and is not simply using that claim

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burden resident aliens, but it has also—with help from the courts—bestowed on legal aliens nearly all the rights enjoyed by citizens. Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1, 5–7 (1989). Congress has neither sanctioned nor anticipated any compelling interest that would serve as a justification for excluding only legal aliens from the local apportionment base.

133. 377 U.S. 533, 567 (1964); *see also Garza*, 918 F.2d at 778, 782–84 (Kozinski, J., concurring in part and dissenting in part) (citing cases stressing importance of protecting citizen's vote against dilution)

134. Carpenter v. Hammond, 667 P.2d 1204, 1213 (Alaska), *appeal dismissed*, 464 U.S. 810 (1983).

135. ELY, *supra* note 57, at 146.

as a pretext for discrimination, should exclude *all* outsiders—unless some outsiders are so few in number as to be statistically insignificant.[136]

An example from the Court's equal protection jurisprudence helps illustrate why an apportionment plan based on an alienage classification would not meet the second prong of strict scrutiny analysis. In *City of Cleburne v. Cleburne Living Center*, the Court overturned a municipal requirement that group homes for the mentally retarded secure a special zoning permit, finding the ordinance violated the Equal Protection Clause.[137] Because the Court decided the case under lenient rational basis review, the Court did not scrutinize the importance of the city's proffered goal, protecting the residential character of the neighborhood, to determine whether it was compelling. Rather, the Court found that the city's ordinance did not dovetail with that goal. The Court said that if the city were serious about safeguarding its neighborhoods, the city would have required special permits for all non-single-family dwellings instead of adopting an ordinance singling out group homes for the mentally retarded. Phrased differently, the city's ordinance was fatally underinclusive because it irrationally targeted a small part of a larger problem. Thus, even under rational basis review, the regulation was constitutionally infirm. As the Court explained:

> In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a [group] home . . . for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.[138]

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136. For apportionment cases involving local districts, the Court has accepted a population deviation of up to 10% between districts as de minimis and presumptively valid. White v. Regester, 412 U.S. 755, 763 (1973).

137. 473 U.S. 432, 435 (1985).

138. *Id.* at 448. In Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), the Court applied strict scrutiny to a state law requiring corporations to pay for political advertising from special segregated accounts and concluded that the law did not violate the Equal Protection Clause after determining that the law was neither overinclusive nor underinclusive. *Id.* at 660–61, 665–66.

> As we explained in the context of our discussions of whether the statute was 'overinclusive' . . . or 'underinclusive' . . . the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effects of political "war chests" amassed with the aid of the legal advantages given to corporations.

Id.; see also United States v. Paradise, 480 U.S. 149, 190, 191 n.1 (1987) (Stevens, J., concurring in judgment) (defending lower court's remedial injunction against claim it violated Equal Protection Clause and noting that "[b]ecause the decree is neither overinclusive, nor underinclusive, the metaphor of narrow tailoring that is often used in considering the merits of claims based on the Equal Protection Clause simply does not fit the issue before this Court"); Zablocki v. Redhai, 434 U.S. 374, 390 (1978) (applying strict scrutiny to statute barring state residents delinquent in meeting child support payments from entering new

The *Cleburne* Court found that the city's stated justification for its ordinance was probably a pretext, concluded that the ordinance appeared "to rest on an irrational prejudice against the mentally retarded,"[139] and overturned the ordinance as fatally underinclusive.[140]

The same examination of the means-ends fit is required under strict scrutiny, only with much greater rigor. Thus, a local government's claim that it is protecting its citizens' electoral equality by excluding only legal aliens from its apportionment base would meet the same fate as the municipal ordinance in *Cleburne*. If other outsider groups, such as out-of-town students and nonresident military personnel, also resided in the area in significant numbers, the state could not justify treating legal aliens differently than it does these groups. Hence, the Court would almost certainly overturn a discriminatory plan after concluding that it appeared "to rest on an irrational prejudice" against legal aliens.

Similarly, in *Sugarman*, the Court overturned a statute barring aliens from New York's competitive civil service because the ban was both underinclusive and overinclusive.[141] The Court concluded the ban was overinclusive because it extended to jobs such as sanitation worker and typist, for which citizenship was not even arguably relevant; it was underinclusive because it did not extend to other important "elective and high appointive offices," for which citizenship was likely to be important.[142] The Court summarized its findings this way:

> It is at once apparent, however, that appellants' asserted justification proves both too much and too little. As the above outline of the New York scheme reveals, the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose. Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision.[143]

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marriage and concluding that statute violated Equal Protection Clause because it was "grossly underinclusive" and "substantially overinclusive").

139. *Cleburne*, 473 U.S. at 448.

140. *Id.* at 442–47. The Court also has applied a similar analysis outside the equal protection context. In Church of Lukumi Babalu Aye v. Hialeah, 113 S. Ct. 2217 (1993), a First Amendment case, the Court struck down a municipal law banning animal sacrifices in religious rites as underinclusive. The city claimed the ordinance was designed to protect public health and prevent cruelty to animals, but the Court concluded those justifications were merely pretextual because the ban extended almost solely to killing animals during religious rituals. *Id.* at 2233–34.

141. Sugarman v. Dougall, 413 U.S. 634 (1973); *see* Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982) ("[A] classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends."); *see also* discussion of political function exception *supra* part III.

142. *Sugarman*, 413 U.S. at 643.

143. *Id.* at 642.

By greater precision, the Court means that statutes must be narrowly tailored to pass strict scrutiny;[144] that is, there must be a tight means-ends fit.

Applying the Court's equal protection approach to *Garza* shows that the Los Angeles County Board of Supervisors' proposal to exclude only noncitizens (illegal and legal aliens) from the county's apportionment base would not have passed strict scrutiny because it was fatally underinclusive. The county's claim that its apportionment plan served a compelling need would have been undermined by the county's failure to exclude other large groups of outsiders from its apportionment base, especially nonresident military officers and out-of-county students at numerous local colleges.[145] Similarly, in *De Grandy*, the Florida legislature's proposal to adjust the "apportionment base" used for determining compliance with the Voting Rights Act by excluding only noncitizens would fail the strict scrutiny test.

Of course, a state could exclude only a certain group from its apportionment base without triggering strict scrutiny if the excluded group were not a suspect class. For example, an apportionment plan that excluded only out-of-state students would be subjected to rational basis review because students have not been considered a "discrete and insular minority" entitled to heightened judicial protection. Indeed, College Park, Maryland, the home of the University of Maryland's principal campus, has repeatedly passed apportionment plans excluding students because nearly one in every three town inhabitants is a university student.[146] Thus in *Garza*, Los Angeles County could have excluded only illegal aliens from its apportionment base without triggering strict scrutiny because illegal aliens do not constitute a suspect class.[147] The county only would have had to demonstrate that its policy was

144. TRIBE, *supra* note 94, § 16-6, at 1453.

145. *Garza*, 918 F.2d at 763. The county criticized the court-ordered plan both because the districts had different numbers of citizens and because they had different numbers of eligible voters. In its petition for certiorari, the county said the first question presented by the case was as follows: "Whether the one-person, one-vote, equal protection rule of Reynolds v. Sims requires single member districts to be equal in population or equal in citizens (or eligible voters)?" Petition for Certiorari at i, *Garza*, 918 F.2d 763, *filed*, 59 U.S.L.W. 3421 (U.S. Nov. 30, 1990) (No. 90-849). Drawing the districts to exclude only noncitizens would be unconstitutional for the reasons stated previously. Drawing the districts on the basis of registered voters would also almost certainly be unconstitutional because doing so would discriminate against groups whose members register at a below-average rate, including African-American citizens and Hispanic citizens. *See, e.g.*, Ely v. Klahr, 403 U.S. 108, 118–19 (1971) (explaining that voter registration struck down on other grounds is also unconstitutional because it discriminates against Hispanics, Blacks, Chicanos, and American Indians); Travis v. King, 552 F. Supp. 554, 568–69 (D. Haw. 1982) (voiding voter–registration–based plan in Hawaii, like the one approved in *Burns*, because drop in registration rates meant new plan discriminated against minority citizens).

146. The courts, however, repeatedly struck down the town's reapportionment plans for failing to distinguish between students who had not become state residents and so could be excluded and students who had become state residents and so could not. DuBois v. City of College Park, 375 A.2d 1098 (Md. 1977), *appeal after remand*, 410 A.2d 577 (Md. 1980), *appeal after remand*, 447 A.2d 838 (Md. 1982), *cert. denied*, 459 U.S. 1146 (1983).

147. *See* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982).

rational and would probably have been able to withstand a challenge under this lenient standard of review.[148]

As a practical matter, however, excluding only illegal aliens is probably not workable because it is difficult, if not impossible, to count illegal aliens. The simplest approach, and the one suggested by the Federation for American Immigration Reform (FAIR) in a 1980 lawsuit, is to subtract the number of illegal aliens from the total population of the country.[149] As one commentator notes, however:

> The main problem with this solution is that there is no assurance that the total population counted includes all, or even most, of the illegal aliens. If it does not, then the Bureau would be subtracting from citizen population. The second problem is that estimates of the illegal alien population range from three to twelve million. In short, no one knows how many there are to subtract.[150]

Applying FAIR's proposed methodology to the 1970 census yielded "a total illegal alien count of *minus* 623,000."[151] During a lawsuit about whether or not illegal aliens should be counted in the 1990 federal census, one expert estimated the number of illegal aliens in the country at between 1 and 5.6 million.[152]

The Census Bureau does not even try to distinguish between legal and illegal aliens and with good reason.[153] Any attempt to modify the census to question aliens about their legal status is apt to discourage aliens from

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148. As justification for its plan, the county could have asserted that it wanted to deny representation to people in the country illegally. While it is debatable whether or not including illegal aliens in the apportionment base would accord them any effective representation, the Court has said that a policy whose effectiveness or purpose is debatable *is* rational for the purposes of rational basis review. Heller v Doe *ex rel.* Doe, 113 S. Ct. 2637, 2646 (1993). Since the Court permits legislatures to approach problems piecemeal under rational basis review, FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2102 (1993), the Court would probably uphold a plan to exclude only illegal aliens. While the Court has said apportionment plans must be "'free from any taint of arbitrariness or discrimination.'" Mahan v Howell, 410 U.S. 315, 325 (1973) (quoting Roman v. Sinock, 377 U.S. 695, 710 (1964)), excluding only *illegal* aliens does not seem arbitrary.

149. Federation for Am. Immigration Reform (FAIR) v. Klutznick, 486 F. Supp. 564, 575 (D.D.C.), *appeal dismissed*, 447 U.S. 916 (1980).

150. *Territorial Approach*, *supra* note 74, at 1364 (footnotes omitted).

151. *FAIR*, 486 F. Supp. at 573.

152. Ridge v. Verity, 715 F. Supp. 1308, 1314 n.3, 1319–21 (W.D. Pa. 1989).

153. After the 1980 census, two demographers with the Census Bureau estimated that the 1980 census included 2,057,000 illegal aliens. Robert Warren & Jeffrey S. Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in 1980 United States Census*, 24 DEMOGRAPHY 375, 382 (1987). The Census Bureau has no formal estimate for the number of illegal aliens counted in the 1990 census. It would be hard to make a reliable estimate because legal aliens are no longer required to register with the Immigration and Naturalization Service, and those registration figures were a key part of the methodology for calculating the number of illegal aliens in 1980. *Id.* at 392. The Immigration and Naturalization Service, however, has provided estimates of the number of illegal aliens in the United States. The Service estimated 2.6 million illegal aliens were in the United States in 1990 and 3.2 million in 1992. Rebecca L. Clark & Jeffrey S. Passel, *Dialogue—Immigrants: A Cost or a Benefit?; Studies Are Deceptive*, N.Y. TIMES, Sept. 3, 1993, at A23 (op-ed).

cooperating with the census and so would decrease its overall accuracy.[154] Several courts have cited the near impossibility of counting illegal aliens as one reason for not attempting to exclude them from congressional districts.[155] If illegal aliens cannot be counted with some degree of accuracy, they cannot be excluded from the local apportionment base either.[156]

A state could also permissibly exclude all outsiders as Kansas did until 1990.[157] If challenged, the Kansas plan would not have been subject to strict scrutiny because Kansas excluded not only aliens but also out-of-state students, nonresident military personnel, and nonresident inhabitants of prisons, nursing homes, and hospitals.[158] Thus the state did not impermissibly draw distinctions based on alienage. Similarly, a state could choose among nonsuspect groups in defining its apportionment base,[159] provided its decision is not arbitrary.[160] It could not, however, pick and choose among suspect classes (e.g., legal aliens) without meeting strict scrutiny. States still enjoy considerable flexibility in defining their apportionment base, but that flexibility is not unlimited. *Graham v. Richardson* means states cannot pursue the goal of greater electoral equality by sacrificing the equal representation rights of aliens alone.

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154. *See Ridge*, 715 F. Supp. at 1321; *FAIR*, 486 F. Supp. at 568 (summarizing argument of Census Bureau); Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 845–46 (1981).

155. *Ridge*, 715 F. Supp. at 1319–21; *FAIR*, 486 F. Supp. at 573–74.

156. How accurate such a count would have to be is a complicated question beyond the scope of this Note.

157. BILL GRAVES, STATE OF KANSAS ADJUSTMENT TO THE 1990 U.S. DECENNIAL CENSUS 11 (1991) (on file with author).

158. BILL GRAVES, 1988 KANSAS CENSUS 5 (1988) (on file with author); *see also* Bacon v. Carlin, 575 F. Supp. 763, 764 (D. Kan. 1983) (challenging Kansas apportionment plan), *aff'd*, 466 U.S. 966 (1984); Winter v. Docking, 373 F. Supp. 308, 311 (D. Kan. 1974) (same); Meeks v. Avery, 251 F. Supp. 245, 246 (D. Kan. 1966) (same).

159. Within the last 30 years, three states—Alaska, Hawaii, and Washington—have excluded only nonresident military personnel. *See* Carpenter v. Hammond, 667 P.2d 1204 (Alaska) (upholding apportionment plan that excluded nonresident military personnel and their dependents), *appeal dismissed*, 464 U.S. 801 (1983); HAWAII REAPPORTIONMENT COMM'N, *supra* note 56, at 21, 23 (noting that 14% of Hawaii's population consists of nonresident military personnel and their dependents); Groh v. Egan, 526 P.2d 863, 873 (Alaska 1974) (discussing recent Washington plan that excluded nonresident military personnel and noting that Washington's plan, which was not subject of published lower court decision, was approved without comment by Supreme Court in Washington State Labor Council AFL-CIO v. Prince, 409 U.S. 808 (1972)). Cities and towns can also exclude outsiders who are not members of a suspect class without triggering strict scrutiny. Knox County, Illinois, home of a large correctional center, excluded the prison inmates from its apportionment base. Knox County Democratic Cent. Comm. v. Knox County Bd., 597 N.E.2d 238 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 455 (Ill. 1992). The Township of New Hanover, New Jersey, which straddles part of Fort Dix and McGuire Air Force Base, excluded military personnel because all but 256 of the township's 27,410 residents lived on one of the two military reservations. *See* Marks v. Township Comm. of New Hanover, 308 A.2d 24, 25 (N.J. Super. Ct. App. Div. 1973). The court voided the plan because New Hanover failed to distinguish between resident and nonresident military personnel. *Id.* at 25–27.

160. *See* Mahan v. Howell, 410 U.S. 315, 324–26 (1973); Burns v. Richardson, 384 U.S. 73, 91–92 (1966).

V. CONCLUSION

The recent resurgence of nativism shows no signs of abating. The anti-alien temper of the times began with calls to curtail services to illegal aliens and to crack down on fraudulent asylum seekers. The rhetoric soon gave way to action. Congress appropriated more money for extra border guards,[161] and President Clinton upped the ante, seeking an extra $1 billion to apprehend illegal aliens.[162] Clinton also proposed summary expulsion at the border for people whose asylum claims are deemed frivolous and took administrative steps to deport ineligible asylum seekers more quickly.[163] Florida began deporting illegal aliens still serving state prison terms; California voters resoundingly ratified Proposition 187, touted as the "Save Our State" initiative.[164] In time, the attack on illegal aliens spread to all aliens. House Republicans, as part of the Contract with America, pledged to exclude legal aliens from the welfare state, even though legal aliens' tax dollars would still go toward programs for which they would no longer be eligible, including Medicaid, food stamps, and welfare. Elected officials in Los Angeles County and Florida proposed excluding all aliens from the apportionment base for local districts and for calculating compliance with the Voting Rights Act.

With nativist sentiments still rising, other jurisdictions will be sorely tempted to exclude aliens from their apportionment base. Incumbent politicians will see such a strategy as a bulwark to protect their seats against the growing clout of minority voters. Nativists will see it as a way to steer government resources away from aliens. This Note is intended as a preemptive strike against such exclusionary political tactics.

Together *Burns* and *Graham* mean that local governments cannot exclude only legal aliens from their apportionment base, no matter how politically or economically expedient doing so appears to be, without triggering strict scrutiny. *Cabell* shows that the political function exception to strict scrutiny does not immunize government plans to deprive legal aliens of virtual representation by excluding them from the local apportionment base. Subjected to the rigors of strict scrutiny, nativist-driven plans to exclude only legal aliens cannot pass constitutional muster. Local governments that want to pursue electoral equality cannot do so on the cheap; they must exclude all outsiders,

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161. Deborah Sontag with Stephen Engelberg, *Borders and Barriers*, N.Y. TIMES, Oct. 30, 1994, § 1, at 1.

162. Bennett Roth, *The President's Budget; Immigration Plan Asks $1 Billion More for INS*, HOUSTON CHRON., Feb. 7, 1995, at A6.

163. Thomas L. Friedman, *Clinton Seeks More Powers To Stem Illegal Immigration*, N Y. TIMES, July 28, 1993, at A13; Steven Greenhouse, *U.S. Moves To Halt Abuses in Political Asylum Program*, N Y TIMES, Dec. 3, 1994, § 1, at 8.

164. Doreen Carvajal, *Coalition Prepares To Battle "Save Our State" Proposition*, L.A. TIMES, Aug. 3, 1994, at B5.

not just legal aliens, or their plan will fail the means-end test required under strict scrutiny.

When the nativist winds howl, the Constitution will provide legal aliens with some shelter. It should ensure at least that legal aliens are not the sole group deleted from the local apportionment base.